(17)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 454

ALICE BILLINGSLEY,

Petitioner,

vs.

C. B. HORRALL, Chief of Police.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS.

Morris Lavine,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 454

IN THE MATTER OF THE APPLICATION OF ALICE BILLINGSLEY FOR A WRIT OF HABEAS CORPUS.

PETITION FOR WRIT OF CERTIORARI AND ORIGINAL WRIT OF HABEAS CORPUS.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices thereof:

A.

Summary Statement of Matters Involved.

This is a petition for certiorari to the Supreme Court of the United States.

The issue involved is whether sentence of a woman to a steel bunk, without bedding, for a period of six months, is cruel and unusual punishment forbidden by the Fourteenth Amendment to the Constitution of the United States.

The question also is whether entrapment of a woman by an officer of the law offends the Fourteenth Amendment to the Constitution of the United States, providing:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The question also is whether in a case where a woman is singled out for invidious treatment by officers of the law, the treatment thus accorded violates the Fourteenth Amendment to the Constitution of the United States in denying to such person the equal protection of the laws.

The petitioner herein was arrested on a charge of violation of Section 41.05 of Ordinance 77,000 of the City of Los Angeles, which reads:

> "No woman shall offer her body for the purpose of prostitution or solicit any man to have intercourse with her, for money, or agree to have carnal intercourse with any man for money."

She was arraigned on February 24, 1943, on said alleged offense in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and thereafter was placed on trial before a jury in the court room of Judge Arthur Guerin. She was found guilty of this charge on April 1, 1943, and remanded to the custody of the jail without bail. On April 5, 1943, she was brought up for judgment and sentence and demanded the imposition of judgment and sentence immediately, which request was denied by the court. The court then continued her incarceration over her objections and without her consent referred the matter to the Probation Department.

The petitioner came before the court on April 15, 1943, and without her consent the court ordered probation granted to her on the condition that she be imprisoned for 180 days, that she be discharged at the end of 120 days from imprisonment, and that within 48 hours after her release from custody she leave the State of California and

remain out of the state during the entire period of probation.

Petitioner presented to the court during her hearing that her judgment and conviction were void; that she was entrapped by a man working for the Police Department who received pay for so doing; that she was being prosecuted and singled out for invidious treatment because she was politically active in endeavoring to maintain an escort bureau in the City of Los Angeles.

Thereafter petitioner was immediately returned to the Lincoln Heights jail, where she was forced to sleep on a steel bunk, without bedding or other normally human conditions.

Petitioner appealed to the Appellate Department of the Superior Court, which affirmed the trial court's judgment, except that it ordered the petitioner to serve the 180 days in jail and revoked the trial court's order granting probation and the order imposing banishment from the state as a condition of probation.

Petitioner then filed a petition for writ of habeas corpus in the Superior Court of the County of Los Angeles, State of California, the first court having jurisdiction, challenging her imprisonment and sentence in jail as being violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the equal protection of the laws guaranteed by that amendment. This petition was denied without hearing, and a new petition was filed in the District Court of Appeal of the State of California, Second Appellate District, and that petition was denied without hearing.

Thereafter a petition was filed in the Supreme Court of California, which challenged the judgments and sentences of petitioner as being void under the Fourteenth Amendment. The petition was denied by the Supreme Court on September 2, 1943.

B.

Petitioner is suffering cruel and inhuman punishment in that she is being confined in the Lincoln Heights jail where she is required to sleep on a metal bunk, made of a solid sheet of steel, without matress or pillows, which causes extreme torture, pain and suffering,—or to stand, as the bunks are too close together to allow sitting; that each side of said bunks are curved over solid steel rods so that one attempting to sit on the edge thereof, even though it is impossible to sit in an upright position, is forced to sit on this steel rod; that there are no sanitary measures being given to these metal bunks, and no provisions are made to guard against disease and illness being contracted from other persons who are assigned to the same quarters; that the only covering on these steel bunks is a thin cotton pad, so matted down from constant use that it is not more than the width of a person's finger, and is lumpy and stringy, and serves no purpose whatever as a protection from the hardness of the steel frame; that the conditions of said quarters are filthy, vile and inhuman.

That Dr. Samuel M. Marcus, a physician and surgeon, examined petitioner and gave his opinion that her physical condition was serious and resulted from her confinement treatment.

That the punishment thus being inflicted upon petitioner is not the punishment provided by due process of law and is not authorized by law; that therefore the judgment and sentence being carried into execution is not the judgment and sentence of the court; that the judgment now being carried out is affecting petitioner mentally and physically and is permanently impairing her health, and is contrary to law and null and void, and is in violation of the Fourteenth Amendment to the Constitution of the United States

and is forbidden by due process of law under the Constitution of the State of California.

That your petitioner is denied the equal protection of the laws in this: That she has been singled out for invidious treatment by officers of the State of California; that prior to her sentence in this case she had not suffered any punishment by reason of any judgment or sentence heretofore pronounced; that the charge against her in this case was the alleged offense of offering herself for prostitution in violation of Section 41.05 of Ordinance 77,000 of the City of Los Angeles; that said ordinance has been on the statute books of Los Angeles for several years, and petitioner is informed and believes, and on such information and belief alleges that she is the only person who has been sentenced to the maximum period of six months in jail for the offense of offering upon the first offense; that the customary sentence under such a charge for the first offense is usually a small fine, to-wit, $25.00, and that only where there have been repeated convictions does the court impose jail sentences; that your petitioner is not in such classification.

That the State of California is estopped from enforcing the judgment against petitioner by reason of the fact that, as petitioner is informed and believes, and therefore upon such information and belief alleges, her arrest was brought about through the connivance, trickery and fraud of agents of the state seeking to bring about her arrest and conviction; that this fraud and trickery consists of the following:

That an undercover agent of the City of Los Angeles working in the Police Department, named Charles Morgan, solicited the acquaintance of petitioner some time in January, 1943, about a month before petitioner was arrested; that he thereafter pretended extreme friendship and fondness for petitioner, and made love to her, representing himself to be a single man, and that he proposed marriage

to petitioner; that in truth and in fact the said Morgan was a married man and the father of children, all of which he fraudulently concealed from petitioner; that he knew he could not marry petitioner, but that said Morgan made all of said protestations of affection and love for petitioner and said proposal of marriage to gain the confidence and trust of petitioner; that said Morgan lived in the City of Long Beach, California, and he represented to petitioner that he was a personal friend of District Attorney Fred Howser who formerly lived in Long Beach, and that he had known said Howser since he, Howser, was fifteen years of age, and that through said Fred Howser said Morgan could aid petitioner in another matter which was pending in the Appellate Department of the Superior Court; that said false representations were made to petitioner for the purpose of winning her confidence and trust.

That the said Morgan saw petitioner from three to five times a week during the period prior to her arrest; that he took her to theatres and to dances, and that on one occasion he took her to a dance at the Hilton Hotel in Long Beach, California.

That said Morgan represented to petitioner that he had a wealthy friend, a man who would finance the publication of a book which petitioner had written, and that he then arranged for her to meet this alleged wealthy man at the Alexandria Hotel in Los Angeles on the evening of February 23, 1943; that said Morgan and this supposedly wealthy man, who went by the name of Mr. James, but who was in reality A. F. Gunn, a police officer of the City of Los Angeles, ordered dinner and while waiting for the dinner to be served petitioner read portions of her book to them; that before the dinner was served said Morgan excused himself and left petitioner with Officer Gunn, who had falsely represented himself to be a Mr. James from Chicago, and falsely represented himself to be a man of

wealth, and who told petitioner that he was highly interested in her book and in financing the publication of the same.

That all of these said statements and representations were false and fraudulent and designed to bring about the arrest of petitioner and to entrap her into the appearance of committing an offense.

That at no time during the trial of the action did the state produce said Charles Morgan, nor did Police Officer Gunn, who had represented himself as Mr. James to petitioner, disclose to the court and jury that the arrest and conviction of petitioner was the result of a plot and plan between said Morgan and said Gunn to bring about the arrest, conviction and sentence of petitioner.

That petitioner has been in the business of being an escort for men to social functions and entertainments; that there has been a drive on by the Police Department of the City of Los Angeles, and particularly by the Police Commission of the City of Los Angeles, to prevent her from engaging in a perfectly lawful and honorable business, and that it was the object of the Police Department falsely to bring about her arrest and conviction by entrapment and unlawful methods through the instrumentality of said Charles Morgan as an undercover agent of the Los Angeles Police Department and said Officer Gunn.

That each and all of these methods are contrary to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and that the judgment and sentence is therefore null and void.

C.

Reasons Relied On for the Allowance of the Writ.

1. Petitioner is suffering from cruel and unusual punishment not provided for by the statutes of the United States or of the State of California.

2. Cruel punishment is defined as torture. The use of steel bunks for women, without proper equipment, is torture of the worst kind. The Fourteenth Amendment, providing for due process of law in the United States, forbids such barbarous treatment by the states, and such treatment is not sanctioned by due process.

3. Entrapment by officers of the law has always been regarded as contrary to the American principles of justice and is forbidden by the Fourteenth Amendment to the United States Constitution.

4. Invidious treatment in singling out a defendant offends the equal protection of the laws. This Court has always looked to protect the individual against the invidious powers of the state.

D.

Cases Relied On to Support Jurisdiction.

Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 716.
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 792.
Ex parte Kemmler, 34 L. Ed. 519.
Hurtado v. *California*, 110 U. S. 516, 28 L. Ed. 232.
Wilkerson v. *Utah*, 99 U. S. 130, 135, 25 L. Ed. 345, 347.
Ex parte Lange, 18 Wall. (U. S.) 163, 85 L. Ed. 872.
Ann. Cas. 705.
McDonald v. *Com.*, 73 Am. St. Rep. 293, 53 N. E. 874.
State v. *Driver*, 78 N. C. 423.
State v. *Griffin*, 84 N. J. L. 429, 87 Atl. 138 (affirmed in 90 At. 259).
Mitchell v. *State*, 82 Md. 527, 34 Atl. 247.
Stagway v. *Riker*, 84 N. J. L. 201, 86 Atl. 440.
Central of Ga. R. R. Co. v. *R. R. Comm.*, 161 Fed. 925.
Ely v. *Thompson*, 3 A. K. Marsh, 774.
State of La. ex rel. Garvey v. *Whitaker*, 48 La. Ann. 527.

Powell v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158.
Moore v. *Dempsey,* 261 U. S. 86, 67 L. Ed. 543.
Chambers v. *Florida,* 309 U. S. 227, 84 L. Ed. 716.
White v. *Texas,* 310 U. S. 530.
Maxwell v. *Dow,* 176 U. S. 581, 44 L. Ed. 597.
Yick Wo v. *Hopkins,* 118 U. S. 374.
Smith v. *Texas,* 311 U. S. 128, 85 L. Ed. 84.
Hysler v. *Florida,* 86 L. Ed. 932.

Respectfully submitted,

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(8570)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 454.

ALICE BILLINGSLEY,

Petitioner,

vs.

C. B. HORRALL, Chief of Police,

Respondent.

Respondent's Brief on Petition for Certiorari.

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TABLE OF AUTHORITIES CITED.

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Foreword.

Examination of the copy of the petition filed in this court in the above entitled action discloses that, although it purports to be an application for original writ of habeas corpus as well as for certiorari, it is not signed by the petitioner and is not verified.

Examination also discloses that the petitioner challenges the validity of the judgment of the court upon the ground that the conviction was obtained through the use of a paid informer who entrapped the petitioner. This concerns procedure in the trial court, and if it is the intent of the petitioner to review the correctness of the judgment, it would appear that the People of the State of California, plaintiff in such court, should be a party to the instant proceeding.

Both of the matters above mentioned will be more fully discussed in our argument.

Statement of the Case.

This is, in effect, a petition to review the action of the Supreme Court of California in denying a writ of habeas corpus. Certain proceedings in the lower courts of the State are set out in the record of such court, to which reference will be made.

The petitioner herein, defendant in the trial court, was charged with violation of Section 41.05 of the Los Angeles Municipal Code (Ordinance No. 77,000) [Tr. p. 12, fol. 19], which reads as follows:

> "Sec. 41.05. *Prostitution—Offering:*
>
> No woman shall offer her body for the purpose of prostitution or solicit any man to have intercourse with her, for money, or agree to have carnal intercourse with any man for money."

The offense is colloquially referred to as "offering."

After trial by jury petitioner was found guilty [Tr. p. 14, fol. 21]. Motion for new trial was filed April 5, 1943, and on that date was denied [Tr. p. 14, fol. 21] after which, on said date, the cause was continued to April 15, 1943, on the "court's own motion," for probation and sentence [Tr. p. 15, fol. 21].

On April 15, 1943, probation report was filed, judgment of imprisonment for 180 days was pronounced, and probation was ordered [Tr. pp. 15 and 16, fol. 22]. Thereafter, appeal to the Appellate Department of the Superior Court was perfected. On June 30, 1943, such court af-

firmed the judgment of the trial court and set aside the order of probation [Tr. p. 17, fol. 24].

Subsequently, on July 9, 1943, the petitioner was committed in accordance with the terms of the sentence previously imposed.

The petition for writ filed in the State Supreme Court contains many allegations which are unsupported by the record presented. The petition filed in this court likewise contains certain allegations not supported by the record. Discussion of such matters will appear in our argument, and it is deemed unnecessary to burden the court with an analysis of such statements at this point.

In submitting our argument we shall follow our objections to the jurisdiction of this court by discussion of the various paragraphs of petitioner's application to the Supreme Court of this State substantially in the order in which they appear in the transcript of the record served in connection with the petition herein.

ARGUMENT.

Summary of Argument.

1. Objections to jurisdiction upon the ground that the petition filed in this court is insufficient as a petition for original writ of habeas corpus; there is a lack of proper parties respondent, and habeas corpus is not the proper remedy.

   a. The petition filed in this court is insufficient as a petition for original writ of habeas corpus.

   b. There is a lack of proper parties respondent.

   c. Habeas corpus is not the proper remedy.

2. The judgment of the Appellate Department of the Superior Court is not void or in excess of its jurisdiction.

3. The Municipal Court did not lose jurisdiction to sentence.

4. The alleged invalidity of conditions of probation is immaterial to the instant proceeding.

5. Petitioner is not denied equal protection by reason of the sentence imposed.

6. The record does not show unlawful entrapment.

7. The court had jurisdiction to order sentence previously imposed to be placed in execution.

8. Alleged improper confinement of petitioner does not require her release from confinement.

POINT I.

Objections to Jurisdiction Upon the Ground That the Petition Filed in This Court Is Insufficient as a Petition for Original Writ of Habeas Corpus; There Is a Lack of Proper Parties Respondent, and Habeas Corpus Is Not the Proper Remedy.

A. THE PETITION FILED IN THIS COURT IS INSUFFICIENT AS A PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS.

Examination of the copy of the petition filed in this court plainly indicates that such petition was not signed by the petitioner, and is not verified.

As a condition precedent to the issuance of a writ of habeas corpus there shall be filed a verified petition signed by the person for whose relief the writ is intended.

28 *U. S. C. A.* 454;

McDonald v. Hudspeth (C. C. A., Kan.), 113 Fed. (2d) 984.

It follows that such petition can only be considered as a petition for writ of certiorari to review the action of the state court.

B. THERE IS A LACK OF PROPER PARTIES RESPONDENT.

Examination of the record discloses that what is sought to be done is to review the judgment of the trial court by means of a writ of habeas corpus. Although it is firmly established that the warden or jailer is the only necessary party in an action challenging imprisonment upon a judgment absolutely void, it appears to us that where the purpose is to review the action of a lower court, acting within

its jurisdiction, the People of the State should be made a party respondent.

Inasmuch as this subdivision of our argument is quite closely connected with the following paragraph, we shall avoid repetition by including all argument under such paragraph heading.

C. HABEAS CORPUS IS NOT THE PROPER REMEDY.

It is well settled that habeas corpus reaches only to questions of jurisdiction of a court whose judgment is challenged.

Bowen v. Johnson, 306 U. S. 19, 23;
Knewel v. Egan, 268 U. S. 442.

The petition filed in the State Supreme Court discloses that at least a part of what was sought was a review of the decision of the Appellate Department of the Superior Court. It cannot well be urged that the Superior Court was not acting within its jurisdiction in affirming or reversing a judgment and order of the Municipal Court. If the decision of such court upon some federal question was erroneous, the petitioner, appellant in such court, had the right to a direct appeal to this court.

In regard to petitioner's contention that, after return of remittitur from the Superior Court the lower court exceeded its jurisdiction in committing the petitioner (although such commitment was nothing more than placing in execution a judgment previously rendered), such order of commitment was an order made after judgment from

which a new and separate appeal could have been taken (*Penal Code of California*, Sec. 1466, subd. 2, item b), and if the decision of the Superior Court upon such appeal be incorrect upon the federal questions involved, an appeal lies direct to this court.

Where a court has jurisdiction of the person and the subject matter in a criminal prosecution, the writ of habeas corpus cannot be used as a writ of error to review its decision.

Bowen v. Johnson, supra, 306 U. S. 19.

A writ of habeas corpus will seldom be issued to review in a federal court the proceedings in a criminal case in the state court.

Storti v. Mass., 183 U. S. 138;

Collins v. Johnson, 237 U. S. 502.

Paragraph IV of petitioner's petition to the State Supreme Court [Tr. p. 4, fol. 6, to p. 5, fol. 7] concerns the alleged method of imprisonment and has no bearing upon the validity of her sentence. The judgment of the trial court was that she be confined in the City Jail. The court had jurisdiction to impose confinement in the City Jail as punishment for misdemeanors.

Conceding for the purpose of this argument only that if a person be confined in a jail, the construction and furnishings of which are such as to result in inhuman punishment, this court has the power upon original habeas corpus to inquire into such confinement and order that the con-

ditions of confinement be changed, it still remains a fact that the petition to this court is insufficient to justify the issuance of an original writ.

Upon certiorari the most this court could do would be to order the state court to conduct a hearing to determine whether the alleged conditions actually existed; at which hearing the respondent would have an opportunity to refute the allegations of the petitioner. Pending such hearing the petitioner would not be entitled to absolute release; at most she would be entitled to release from improper confinement, if any.

The petitioner was committed July 9, 1943 [Tr. p. 16, fol. 23], for a period of 180 days, which period would expire on January 4, 1944, unless she be allowed time off for good conduct, in which case she would be released about December 7th. In other words, by the time the order of this court could reach the state court, the proceedings thereunder, including filing of respondent's answer, trial of questions of fact raised thereby, and decision of the state court made, the sentence of the petitioner would have long since terminated.

This court will not issue habeas corpus where the issues involved would have become moot before action of the court could become beneficial to the petitioner.

Ex parte Baez, 177 U. S. 378.

POINT II.

The Judgment of the Appellate Department of the Superior Court Is Not Void or in Excess of Its Jurisdiction.

Petitioner asserts [Tr. p. 2, fol. 3] that the Appellate Department substituted its judgment for that of the trial court, thereby requiring that the petitioner serve 180 days instead of 120 days as ordered by the trial court. Such statement is wholly incorrect. The original judgment of the trial court, which was the judgment affirmed, was that the petitioner serve 180 days. However, it appears that after the judgment was imposed the trial court attempted to suspend execution of such judgment and place the petitioner on probation subject to certain conditions, one of which was that 120 days of the probationary period be spent in the City Jail. The order suspending sentence and placing petitioner on probation for 120 days was no part of the sentence.

People v. Wallach, 8 Cal. App. (2d) 129.

The court, either before pronouncing judgment or subsequent to such action, may place a defendant on probation (*Penal Code of California,* Sec. 1203; *People v. Wallach, supra,* 8 Cal. App. (2d) 129), and an order placing a defendant on probation, even though it include as a condition thereof a period of detention in jail, is not a judgment and sentence.

In re Goetz, 46 Cal. App. (2d) 848.

It thus appears that, in effect, an order suspending execution of sentence and placing a defendant on probation, is an order made after judgment.

The Appellate Department had before it two matters, separate and distinct from each other: (1) the judgment of imprisonment, and (2) the order made after judgment. The court affirmed one and set aside or reversed the other.

Petitioner alleges [Tr. p. 3, fol. 4] that the Appellate Court had no authority to substitute its judgment for that which the judge of the Municipal Court wished to impose upon a reconsideration of the case. The judge of the Municipal Court had exercised his jurisdiction to sentence at the time he originally imposed sentence. He was thereafter without jurisdiction to change such sentence so long as it remained unreversed.

Ex parte Garrity, 97 Cal. App. 372.

Petitioner also alleges [Tr. p. 3, fol. 4] that the mandate of the Appellate Department left the trial court no alternative but to place the judgment in effect. This statement is also incorrect. The law is well settled in this State that upon receipt of remittitur affirming the judgment the trial court has jurisdiction to consider probation.

Lloyd v. Superior Court, 208 Cal. 622;

Ex parte Bost, 214 Cal. 150.

Summarizing the law it appears that, although the court may set aside a void judgment or correct an erroneous entry of judgment at any time, it may not change its mind and set aside a valid judgment and enter a new and different judgment. However, the court has jurisdiction to consider probation at any time prior to the time when a defendant enters upon execution of his sentence.

The trial court, therefore, was at liberty upon receipt of the remittitur to soften the rigors of the sentence upon application by defendant for probation or upon the court's own motion.

The petitioner's statement that the trial court revoked the petitioner's probation without a hearing is likewise incorrect. The Appellate Court had held that the original order of probation was void and of no effect; hence there was no order to be revoked. The petitioner may not now complain because probation was not granted after receipt of the remittitur as there is no showing that she made any application therefor prior to her commitment, or at any other time.

The cases universally hold that the granting of probation is a matter of grace and not of right. The cases further hold that the court may revoke probation without a formal hearing in the event it is made to appear that there is a good cause therefor.

Burn v. U. S., 287 U. S. 216;

In re Young, 121 Cal. App. 711, and cases therein cited.

Esco v. Zerbst, 295 U. S. 490, is readily distinguished because of the difference between the statute there involved and the California statute involved in the instant case (*Penal Code of California*, Sec. 1203.2).

In view of the fact that no order was in effect to be revoked it is deemed unnecessary to follow the subject of revocation farther.

POINT III.

The Municipal Court Did Not Lose Jurisdiction to Sentence.

In reply to petitioner's paragraph II of her petition to the California Supreme Court [Tr. p. 3, fol. 5] in which it is claimed that, because she was not sentenced within the time named in Section 1449 of the Penal Code of California the court lost jurisdiction to sentence, we observe such section provides that a defendant shall be sentenced within five days after the verdict, unless (a) time of sentence be extended for not to exceed ten days for the purpose of hearing a motion for a new trial, or (b) extended for not to exceed twenty days for consideration of probation.

The record discloses that the verdict of guilty was rendered on April 1, 1943; that the court ordered probation be considered, and that petitioner was sentenced on April 15, 1943, well within the time to which the court could extend time for sentence.

Section 1203, Penal Code of California, permits the court to consider probation upon request of the defendant or of the People, or upon the court's motion.

POINT IV.

The Alleged Invalidity of Conditions of Probation Is Immaterial to the Instant Proceedings.

In paragraph III of petitioner's petition to the State Supreme Court [Tr. p. 3, fol. 5] petitioner alleges that the order of the trial court, as part of the conditions of probation that she leave the state, was unconstitutional and void.

We have heretofore pointed out that such order was completely set aside by the judgment of the Appellate Court.

We have heretofore pointed out that the order of probation was no part of the judgment of conviction. Upon reversal and vacation of such order the defendant was in the same position as though the order had never been made.

It is well settled that a party may not complain of an order which does not affect him. The petitioner's insistence [Tr. p. 4, fol. 6] that the Appellate Court altered the judgment of the trial court is without foundation either in law or fact, as also is her statement that it was impossible to state what judgment the trial judge would have pronounced had he not pronounced an invalid judgment of banishment. We know what judgment he did pronounce, to wit, 180 days' imprisonment. We cannot know what terms of probation he would have imposed had he been asked to exercise his jurisdiction and consider probation after decision by the Appellate Court. As petitioner did not ask for probation she may not now complain because she does not know what terms would have been imposed upon her as conditions of probation.

POINT V.

Petitioner Is Not Denied Equal Protection by Reason of the Sentence Imposed.

We next direct attention to paragraph V of the petition to the State Supreme Court [Tr. p. 5, fols. 7, 8] in which petitioner urges that there has been unlawful discrimination by reason of the sentence of 180 days.

It is alleged upon information and belief that petitioner is the only "first" offender of the ordinance to be so sentenced. Assuming the truth of such assertion it nowhere appears that the facts and circumstances of such offense did not justify the punishment imposed. Establishing appropriate penalties for criminal offenses and granting judicial discretion respecting the punishment to be meted out in particular offenses does not violate the provisions of the Fourteenth Amendment.

Collins v. Johnson, supra, 237 U. S. 502.

A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense.

U. S. v. Pridgeon, 153 U. S. 48.

Within the statutory limit, the sentence imposed is exclusively within the discretion of the trial court.

Fienberg v. U. S., 2 Fed. (2d) 955.

We must assume that facts before the court justified the exercise of the court's discretion in the instant case.

POINT VI.

The Record Does Not Show Unlawful Entrapment.

The burden of petitioner's complaint, in paragraph VI of her petition to the state court [Tr. p. 5, fol. 8, to p. 7, fol. 11], is that she was entrapped into committing the offense of which she was convicted.

Petitioner was convicted of having offered to have sexual intercourse with a male person. There appears no statement which can be construed as a denial of the fact that she did make such an offer as is proscribed by the ordinance. Assuming for the purpose of argument that petitioner's statement in regard to the incidents are correct, it nowise appears that any deceit, practiced for the purpose of making the acquaintance of the petitioner, tended to cause her to desire to have sexual intercourse with the person to whom she was thus introduced.

All the facts were known to petitioner at the time of trial, and evidence concerning them was introduced in the trial of the action. The jury resolved the facts against any unlawful entrapment. The facts were before the Appellate Court and the plea of unlawful entrapment was there again resolved against petitioner. It must be assumed in this collateral attack upon the judgment that the decisions of the lower courts were correct.

It is well settled that the function of the writ of habeas corpus is to inquire into the jurisdiction of the trial court, and that courts will not undertake to retry the issues of fact in such proceeding.

Bowen v. Johnson, supra, 306 U. S. 19.

This is especially applicable in the instant case where petitioner had the opportunity of appealing direct to this court for determination of all federal questions involved. Instead of doing so, she elected to present the question upon her interpretation of the record.

This case is readily distinguished from cases such as the *Mooney* case, in which it was alleged in the petition that extrinsic fraud was an element of the prosecution and it appeared that proof of such fraud was not available to the defendant until after his trial and conviction.

Neither does the situation in this case fit in with the case of *Chambers v. Florida,* 309 U. S. 227, cited by petitioner, wherein it appears that the entire record of the lower court was before this court for examination.

The case at bar is also readily distinguishable from *Waley v. Johnson,* 316 U. S. 101, in which it appears that the matters sought to be inquired into were matters which would not have been disclosed by the record on appeal if an appeal had been taken.

POINT VII.

The Court Had Jurisdiction to Order Sentence Previously Imposed to Be Placed in Execution.

Petitioner's paragraph VII [Tr. p. 7, fol. 11] is in effect a repetition of the claim set out in paragraph II, and requires no additional discussion except as to the allegation concerning punishment for ten days by confinement between date of conviction and date of sentence.

The right of courts to require persons convicted of criminal offenses to be confined awaiting sentence, is too well settled to justify extensive argument. It is likewise well settled that such confinement is not considered as any part of the punishment for crime.

POINT VIII.

Alleged Improper Confinement of Petitioner Does Not Require Her Release From Confinement.

In paragraph B of her petition to this court (Petition for Writ, pp. 4, 5) petitioner makes certain statements concerning alleged conditions of confinement. Such petition does not appear to have been verified, for which reason such statements may be disregarded herein.

Similar allegations, however, appear in the verified petition filed in the state court [Par. IV, Tr. p. 4, fols. 6, 7]. Our statute provides that the sheriff shall accept prisoners and provide them with necessary food, clothing and bedding (*Penal Code of California,* Sec. 4015) and the duty of the chief of police to prisoners in the City Jail is the same as that of the sheriff (*Penal Code of California,* Sec. 4022). There is a presumption that official duty has been done.

The petition does not allege that the bunk assigned to the petitioner for her use differs in any respect from the bunks assigned to and used by the hundreds of other prisoners confined in the same jail.

The statutes of this State provide for the inspection of jails and reports concerning their condition (*Welfare and Institutions Code of California,* Secs. 215, 216) and the Grand Jury must inquire into the condition and management of public prisons (*Penal Code of California,* Sec. 923). It must be presumed that officials charged with the duty of inspection have performed their duties and that

the equipment, furnishings and accommodations in our jails do not unfavorably compare with those which are standard throughout the State.

Section 681 of the Penal Code of California declares it to be a misdemeanor to use in a jail any cruel or unusual punishment upon, or allow any lack of care of, prisoners. It cannot well be assumed that the Chief of Police of this City has violated such law.

Although the procedure adopted by petitioner affords no ready method whereby the respondent at this stage of the proceedings may file a verified answer to the allegations in her petition concerning facts which are not part of the record of the trial court, we feel that the allegations made by her are insufficient to warrant any affirmative action by this court.

Assuming, however, that we are incorrect in that respect, it is plain that petitioner is not entitled to her release from jail. The most she is entitled to is a release from improper treatment in such jail. It would be a peculiar situation indeed if acts amounting to mistreatment of a prisoner by a jailer entitled such prisoner to entire freedom from punishment. His debt to society is not so easily paid, although perhaps the jailer would be subject to criminal prosecution for his acts.

Conclusion.

The respondent submits that the petition in this action is wholly insufficient to justify the issuance of an original writ of habeas corpus, and is likewise insufficient to justify issuance of a writ of certiorari to review the judgment pronounced against the petitioner.

The most that can be said for the petition is that, when viewed in the most charitable light, it might justify an order to the state court to permit a hearing, after answer filed by the respondent, upon the question of whether the imprisonment of petitioner is accompanied by improper conditions due to actions of the jailer. We do not deem the petition sufficient, however, to justify such action and we urge that certiorari should be denied.

Respectfully submitted,

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